Supreme Court, U. S.
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IN THE SUPREME COURT
UNITED STATES OF AMERICA OCTOBER TERM 1977
No. 77-1015

RONALD PRATE, LEONARD LA ROSA, PATRICIA PLUMERI, PATRICIA A. DOYLE, THERESA YOUNG, TERRENCE P. ANDERSON, MICHAEL A. DI GIOVANNI, GARY GENNARINO, MICHAEL C. KELLER, CHARLES J. ZONA, JOSEPH P. TANTALO, MICHAEL PERRY, SAMUEL T. GERMANO, RONALD S. ZAVAGLIA, CAROL TSCHIDERER and THOMAS A. TSCHIDERER,

Petitioners,

-vs-

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; and EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Respondents.

-vs-

JOHN HOWARD, JOHN WYCHE and JOHNNY SMITH,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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The Petitioners, Ronald Prate, et al., respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on October 20, 1977.

OPINIONS BELOW

On October 20, 1977 the United States District Court of Appeals for the Second Circuit entered an order without opinion affirming the decision of the United States District Court for the Western District of New York. (Appendix D, pp. 1, 2).

The opinion of the United States District Court for the Western District of New York (Appendix C, pp. 1-11) entered the 3rd day of May, 1977 has not been reported.

JURISDICTION

1. The Judgment of the United States Court of Appeals for the Second Circuit, affirming the decision of the United States District Court for the Western District of New York, was entered on the 20th day of October, 1977. (Appendix D, pp. 1, 2).

2. The jurisdiction of the Court is invoked under Title 28 of the United States Code, §1254(1), providing for the granting of a Writ of Certiorari upon the petition of any party after rendition of judgment by the Court of Appeals for the Second Circuit.

QUESTIONS PRESENTED

1. Has the Court of Appeals erred in holding that the instant action is an impermissable collateral attack on the Consent Decree?
2. Has the Court of Appeals for the Second Circuit erred in affirming the decision of the United States District Court for the Western District of New York where there has been no admission or judicial finding of past discrimination and a Consent Decree has nevertheless been entered which prefers less qualified minority applicants for an entry level position in the City of Rochester Police Department over non-minority applicants?
3. Has the Court of Appeals for the Second Circuit erred in affirming

the decision of the United States District Court for the Western District of New York in view of the decision of the Supreme Court of the United States in Washington v. Davis, 427 U.S. 229, 48 L. Ed. 2d 597, 96 S.Ct. 2040 (1976)?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The provisions of Constitutions, Statutes and Regulations which are relevant to the decision of this case, and the pertinent text of which is set forth in Appendix A hereto, are as follows:

1. Article IV, Section 1 of the United States Constitution.
2. 28 U.S.C. Section 1343(3).
3. 42 U.S.C. Section 1981.
4. 42 U.S.C. Section 193.
5. 42 U.S.C. Section 2000(d).
6. 42 U.S.C. Section 2000(e) et seq.
7. 42 U.S.C. Section 2000(d)-2.
8. 28 C.F.R. Section 42. 201 (a)-(b).
9. 28 C.F.R. Section 42. 203.
10. Article 1, Section 11 of the New York State Constitution.
11. Article 5, Section 6 of the New York State Constitution.

STATEMENT OF THE FACTS

The action from which appeal was taken to the U.S. Court of Appeals for the Second Circuit was commenced by the sixteen named Petitioners on September 17, 1976. Petitioners sought relief from past discriminatory employment practices which have preferred black, Spanish surnamed and other non-white persons over white persons in the recruiting, testing and hiring of applicants for the position of police officer in the City of Rochester, New York. Past discrimination and the perpetuation thereof has resulted from the implemention of a Consent Order and Judgment signed by the Honorable Harold P. Burke on May 12, 1975 which provided in pertinent part for a 25% minority hiring quota to be effectuated by the creation of two separate eligibility lists, one for minority and the other for non-minority candidates. Until the 25% quota is reached, appointments to the entry level position of police officer are to be made by selecting two persons from the list of minority candidates for every

three persons selected from the list of non-minority candidates.

Fourteen of the sixteen discriminatees herein took and passed the November 9, 1974 qualifying examination but have thus far been denied appointment. The two remaining discriminatees, Carol Tschiderer and Thomas A. Tschiderer, took and passed the July 10, 1976 qualifying examination and have similarly been denied appointment.

Respondents have arbitrarily and wrongfully determined that in order for a white person to be potentially eligible for appointment as a police officer, his score on the written examination must be 90 or over while a non-white persons's score must be 75 or over. Non-white persons having a particular score are preferred over white persons having the same or higher scores.

The above mentioned Consent Order resulted from the action entitled "John E. Howard, et al v. Elisha Freedman, et al 74 Civ 234

(W.D.N.Y.)" wherein Plaintiffs sought relief against the allegedly discriminatory hiring practices of the Rochester Police Department. Prior to the entry of the Consent Order, there was no hearing on the question of past discrimination nor on the job relatedness of the qualifying examination given and administered by Respondents on November 9, 1974. In fact, these findings have never been a part of the record.

A "hearing" into the fairness and propriety of the stipulation of settlement was held before the Honorable Harold P. Burke on the day that trial was to commence, however, the sole finding made thereat was that adequate notice had been given to members of the minority class. Indeed, publicity was predominately directed towards the minority class as evidenced by the words of the Consent Order itself:

> "The parties hereto have entered into a Stipulation for Settlement of the issues raised in this action; and the Court having

ordered that notice of hearing on the advisability of the settlement be given to the members of the class; and the Court, after said notice and hearing having approved the terms of the said Stipulation for Settlement,"

None of the Petitioners received notice of the "hearing" before the Honorable Harold P. Burke, although fourteen of them had previously taken the November 9, 1974 entrance examination and were known by Respondents to be members of a class of discriminatees against whom the Consent Order would operate. None of the Petitioners was present at the hearing.

Thereafter fourteen of the sixteen named Petitioners sought to intervene in the Howard action pursuant to Rule 24(a) (2) FRCP. Their application for intervention was denied, however, on the basis of untimeliness and adequacy of notice.

The present action was brought pursuant to Article XIV, §1 of the United States Constitution, the Civil Rights Acts of 1870 and 1871, Title VI of the Civil Rights Act of 1964, Title

VII of the Civil Rights of 1964, as amended, 42 U.S.C. §2000(e) et seq.and Article V, §6 of the New York State Constitution to redress the evils of the two list hiring scheme. Respondents-Intervenors moved to intervene on or about September 27, 1976, which motion was granted by the Court. Petitioners moved for a preliminary injunction to restrain appointments to the Police Academy on or about October 14, 1976 and such motion was denied by order of the Court dated October 20, 1976. The Respondents-Intervenors and the Respondent, County of Monroe, moved by Notice of Motion dated October 8, 1976 to dismiss Petitioner's cause of action pursuant to Rule 12b FRCP on the ground the Court lacked jurisdiction. The Court, by the Honorable John T. Curtin, rendered its decision on May 3, 1977, granting the motion to dismiss on the grounds of improper collateral attack upon a final judgment.

The Consent Order and Judgment, by its very terms however, is not final. Paragraph

12 of the Consent Order and Judgment states:

> "The United States District Court for the Western District of New York shall continue to have jurisdiction of this matter to entertain an application by any party hereto, made upon papers served upon the other parties hereto at least ten days prior to the return date thereof, seeking relief in the form of interpretation, application, adjustment or termination of any of the terms of the Stipulation on the grounds of inequity or impractability."

Petitioners appealed from this dismissal to the United States Court of Appeals for the Second Circuit which affirmed without opinion.

Based upon the non-finality of the Consent Order and Judgment, the inapplicability of the doctrine of collateral estoppel and for other reasons more particularly set forth below, Petitioners respectfully pray that this Honorable Tribunal will grant a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

THIS CASE MERITS REVIEW BY THIS COURT ON CERTIORARI BECAUSE THIS COURT NEEDS TO SETTLE THE QUESTION WHETHER PERSONS NOT PARTIES TO A PRIOR ACTION NOR IN PRIVITY WITH ANY PARTY, AND WHO HAVE EXPRESSLY BEEN DENIED THE RIGHT TO INTERVENE, MAY BE HELD BOUND BY A NON-FINAL CONSENT ORDER RESULTING FROM A STIPULATION OF SETTLEMENT OF THE PRIOR ACTION.

There is a fundamental difference between the doctrine of res judicata and collateral estoppel. Under the doctrine of res judicata, a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. Lawlor v. National Screen Service Corp., **349 US 322, 326, 75 S. Ct. 865, 867, 99 L. Ed. 1122 (1955). Since Petitioners have commenced but one action against Respondents,**

the doctrine of res judicata is inapplicable.

There are at least four elements which must be satisfied before an order in a former action can be given collateral estoppel effect at a later proceeding: (1) [T]he issue sought to be precluded must be the same as that involved in the prior action; (2) That issue must have been actually litigated; (3) It must have been determined by a valid and final judgment; and (4) The determination must have been essential to the prior judgment. Haize v. Hanover Ins. Co., 536 F2d 576, 579 (3d Cir. 1976); See ¶1B J. Moore, Federal Practice 0.443[1] (2d ed. 1974); restatement (2d) of judgments, Tent Draft #1, §68 (March, 28, 1973). At least three of these four minimum requirements have not been met.

The cases contain factually distinguishable issues. Plaintiffs in the Howard action alleged that an unvalidated written qualifying examination had a disproportionate and, therefore, discriminatory impact upon non-white minority

candidates. Plaintiffs in Prate attack a discriminatory two list hiring system which intentionally prefers lesser qualified minority candidates solely on the basis of race. The claim is one of discrimination in reverse against white candidates.

In Mc Aleer v. American Telephone & Telegraph Co., 416 F. Supp., 435 (1976), Plaintiff, Mc Aleer, commenced his action pursuant to Title VI of the Civil Rights Act of 1964 claiming that a less qualified, less senior female was preferred over him for appointment. A T & T defended on the basis of a consent judgment containing an affirmative action program which obligated it to favor women regardless of seniority in order to eliminate past sex discrimination. The Court, treating the question of identity of issues, stated at pages 438, 439:

> "Plaintiff, Mc Aleer, thus stands as an innocent employee who had earned promotion but was disadvantaged when A T & T rejected his application in order to rectify its past discrimination against women.

> While factually related to the Philadelphia proceeding, this claim does not in any way impugn or collaterally attack the judgment in that case. Rather, it asserts a cause of action for sex discrimination within the Civil Rights Act of 1964 and this Court clearly has jurisdiction to decide the issue. It is unnecessary to elaborate on the obvious fact that a Consent Decree expressly did not and could not have conclusively determined the rights of nonparties such as Plaintiff Mc Aleer."

By parity of reasoning, jurisdiction existed to determine Petitioner's claim of racial discrimination.

The fundamental requirement of actual litigation is simply not present in this case. There has never been a hearing on the merits; Petitioners have never been permitted to join as parties to the Howard action. Absent actual litigation, there can be no collateral estoppel.

Nor is the Consent Order a valid and final one. Paragraph 12 of the Consent Order expressly provides for continuing jurisdiction by the District Court to amend or even terminate the

said order. When an order is subject to redetermination, as such, it is nonfinal. Gerstle v. Continental Airlines, Inc., 466 F2d 1374, 1377 (10th Cir. 1972); In re Cessna Aircraft Distributorship Antitrust Litigation, 518 F. 2d 213, 215 (8th Cir.), Cert. denied, 423 U.S. 947, 96 S.Ct. 363, 46 L. Ed. 2d 282 (1975).

Absent a finding of a clear cut pattern of long-continued and egregious racial discrimination, the imposition of mandatory quotas is constitutionally forbidden reverse discrimination. Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (2d Cir. 1975). A long term, mandatory hiring quota, based upon no showing whatsoever of past discrimination nor its perpetuation, is here involved. The order is constitutionally invalid and affords no basis for the application of the doctrine of collateral estoppel.

Fundamentally, the party against whom the estoppel is asserted must have been a party, or in privity with a party to the prior adjudication. Scooper Dooper, Inc. v. Kraftco Corp., 494 F2d

840, 844 (3rd Cir. 1974). Petitioners were not parties to the earlier Howard action. Fourteen of the sixteen Petitioners sought to intervene but were expressly denied that right. Two of the named Petitioners, Carol Tschiderer and Thomas Tschiderer, were not at all involved in prior proceedings; they did not seek to intervene and, in fact, did not take the written qualifying examination until July 10, 1976.

It is respectfully submitted that the District Court has misapplied the doctrine of collateral estoppel to Petitioners prejudice and has departed far from the accepted and usual course of judicial proceedings. In affirming the decision below, the U. S. Court of Appeals for the Second Circuit has so far sanctioned such a departure as to call for an exercise of this Court's power of supervision.

II

THIS CASE MERITS REVIEW BY THIS COURT ON CERTIORARI BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH ITS DECISIONS IN UNITED STATES V. WOOD, WIRE AND METALS LATHERS INTERNATIONAL UNION, LOCAL UNION NO. 46, 471F.2d 408, PATTERSON V. THE NEWSPAPER AND MAIL DELIVERS' UNION OF NEW YORK AND VICINITY, 514F2d 767 (1975), VULCAN SOCIETY OF N. Y. CITY FIRE DEPART., INC. V. CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, 490F2d 387 (1973), BRIDGEPORT GUARDIANS, INC. V. MEMBERS OF THE BRIDGEPORT CIVIL SERVICE COMMISSION, 482F2d 1333 (1973), KIRKLAND V. THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, 520F2d 420 (2d Cir. 1975) AND IS EQUALLY IN CONFLICT WITH UNITED STATES V. CITY OF CHICAGO, 549F2d 415 (7th Cir. 1977) AND MYERS V. GILMAN PAPER CORP., 544F2d 837 (5th Cir. 1977).

42 U.S.C. §2000(e) - 2(J) provides:

> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organiza-

> tion, admitted to membership or classified by any labor organization, or admitted to or employed in any apprenticeship or other training program, in comparison with persons of such race, color, religion, sex or national origin in any community, state, section, or other area, or in the available work force in any community, state, section or other area."

The only limitation on the powers of affirmative relief granted by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e) et seq. is that restricting preferrential quota hiring. In order for a quota to be distinguishable from a preference, there must be a specific finding of past discrimination. Quotas merely to attain racial balance are expressly forbidden, however, quotas to correct past discriminatory practices are not. United States v. Wood, Wire & Metal Lathers International Union, Local Union No. 46, 471F2d 408.

In Wood, supra., the provisions of a Consent Decree requiring a local union to take

certain affirmative action to remedy the effects of past discriminatory practices were upheld on appeal. The United States Court of Appeals for the Second Circuit found that the record was replete with evidence of past discrimination including an admission and acknowledgment by appellants themselves in the settlement agreement which became the basis of the Consent Decree.

In Patterson v. Newspapers and Mail Delivers' Union of New York and Vicinity, 514 F2d 767, 771, another case involving a Consent Decree the Court, citing Wood, supra., upheld the challenged Consent Decree stating:

> "Nor should we substitute our ideas of fairness for those of the District Judge in the absence that he acted arbitrarily or failed to satisfy himself that the settlement agreement was equitable to all persons concerned and in the public interest, (citations omitted), especially in a case like the present one where the settlement was approved after a four week trial on the merits, and two hearings with respect to the fairness and adequacy of the proposed agreement."

A prima facie case of discrimination is established under Title VII where the evidence shows "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed. 2d 280 (1975). Upon such a showing, the burden shifts to the employer to show "that any given requirement [has] a manifest relationship to the employment in question," and that the "disparity [is] the product of non-discriminatory factors." Griggs v. Duke Power Co., 401, U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).

It is respectfully submitted that before a permanent 25% hiring quota is approved, there must be a fact finding hearing on the issues of past discrimination and job-relatedness of the qualifying examination. Otherwise, an unlawful hiring preference exists.

The two list hiring system at issue has precisely the same characteristics and conse-

quences as the system disallowed in Kirkland v. New York State Department of Correctional Services, 520 F2d 420 (2nd Cir. 1975). The benefits of such order are not limited to the plaintiffs class. Its quota requirements are based upon a shifting and rapidly expanding racial base, wholly unrelated to the consequences of any alleged past discrimination. It provides for appointment according to race without regard to the individual applicant's standing on a job-related examination. It completely ignores the statutory requirements and constitutional purpose of the New York Civil Service Law and constitutes Court-imposed reverse discrimination without any exceptional or compelling governmental purpose.

Article 5, Section 6, of the New York Constitution requires that appointments and promotions in the civil service "shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive."

The system here imposed negates the competitive purpose of the written examination and, in the absence of a showing of past discrimination, is constitutionally suspect.

There is no precedent within the Second Circuit for the broad, sweeping remedial relief imposed by the District Court. In reviewing its "limited" and "gingerly" use of quotas, the Court, in Kirkland, observed that in each case, "there was a clear cut pattern of long-continued and egregious racial discrimination. No such pattern of practice has been shown by Respondents."

In an equity case, the nature of the violation determines the scope of the remedy. Swann v. Charlotte-Mecklenburg Board of Education, 402, U.S. 1, 16, 91 S. Ct. 1267, 28 L. Ed. 2d 545. There is, therefore, no basis for justifying a remedy where there has been no violation and no basis for justifying a remedy substantially broader than that called for by the violation.

When a District Court finds that discriminatory practices on the part of a union or an employer have prejudiced minority workers, it should frame its relief with an eye towards remedying the wrong, see generally Albemarle Paper Co. v. Moody, 422 U.S. 405, 421, 95 S.Ct. 2362, 45 L. Ed.2d 280 (1975), and should interfere with the Defendant's operations no more than is necessary to accomplish this result. E. E. O. C. v. Local 638 . . . Local 28, Sheet Metal Workers, 532 F2d 821, 829 (2d Cir. 1976); Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (2d Cir. 1975). A Court should not proceed to issue a broad sweeping remedial order without some evidence before it as to the effect which the order will have. E. E. O. C. v. Local 14, International Union of Operating Engineers, 533 F2d 251 (2d Cir. 1977).

In some cases it may be unnecessary to provide a full evidentiary hearing on relief to a party that has fully participated in prior

stages of the proceeding. See United States v. Wood, Wire and Metal-Lathers Local No. 46, 471 F2d 408, 415-16 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2773, 37 L. Ed. 2d 398 (1973). However, where, as in the instant case, the Petitioners have been barred from participation at all levels, a hearing on the relief to be ordered is required.

The decision appealed from creates a conflict of opinion within the Circuit Courts of Appeal which should be settled by this Court. In United States v. City of Chicago,, 549 F2d 415, 437 (7th Cir. 1977) the Court stated that "preferrential numerical relief nevertheless remains an extraordinary remedy, and its use must be justified by the particular circumstances of each case." The imposition of a racial quota in United States v. City of Chicago, supra., occured only after specific findings of discrimination were made after a seventeen day hearing on requested preliminary relief and a trial on the merits.

The rule has been equally well settled in the Fifth Circuit. Before a Court can grant any relief in a Title VII suit, it must find that the Defendants engaged in the unlawful employment practice alleged in the complaint. 42 U.S.C. §2000(e)-5(g); Myers v. Gilman Paper Corp., 544 F2d 837 (5th Cir. 1977). In Myers, the Court approved a Consent Decree containing provisions for affirmative relief only after fifteen months of motions and discovery and a four day trial on the merits.

The issue thus narrows itself to the legality of preferences and quotas in an affirmative action plan where there has been no admission or judicial finding of past discrimination. This is an important Federal question which has not been, but should be settled by this Court.

III

THIS CASE MERITS REVIEW BY THIS COURT ON CERTIORARI BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THIS COURT'S DECISION IN WASHINGTON V. DAVIS, 427 U.S. 229, 48 L. Ed. 2d 597 96 S. Ct. 2040 (1976).

The case of Washington v. Davis, 427 U.S. 229, 48 L. Ed. 2d 597 96 S. Ct. 2040 (1976), changes existing case law in the area of racial discrimination in two significant respects. The standard by which racial discrimination cases under the Constitution are to be judged is now one of intentional or invidious discrimination. Previously, as in Bridgeport Guardians v. Members of the Bridgeport Civil Service Commission, supra., Vulcan Society of the New York City Fire Depart. v. Civil Service Commission of the City of New York, supra., and Chance v. Board of Examiners, 534 F2d 1933 (2nd Cir. 1975), upon a showing of disproportionate racial impact, the municipality or employer was put to the burden of proving that the qualifying examination was validated in terms of job performance.

In Washington v. Davis, supra., the hiring practices of the Police Department of the District of Columbia were challenged as discriminatory on the grounds that the personnel tests allegedly excluded a disproportionately high percentage of black applicants. The Court stated:

> "We have difficulty understanding how a law establishing a racially neutral classification for employment is nevertheless discriminatory and denies 'any person equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. (426 U.S. 245)

The result of Washington is that plaintiffs alleging racial discrimination under the Constitution must now prove that the municipality or employer invidiously discriminated against them.

At the time the Court entered the May 12, 1975 Consent Decree, the "test" of discrimination was identical in both Constitutional and Title VII cases. Significantly, therefore, no showing of invidious discrimination has ever been made.

Moreover, recent decisions by the United States Supreme Court seem to point in the direction of a uniform standard, such as the compelling interest test, for all cases of alleged discrimination. In Mc Donald v. Santa Fe Trail Transporation Co., No. 75-260, slip. op. (June 25, 1976), the Court held that Title VII and Section 1981 of Title 42 of the United States Code prohibit discrimination against all races on the same terms.

Classification by race is subject to strict scrutiny at least where the classification results in a detriment to a person because of his race. In the case of such a racial classification, not only must the purpose of the classification serve a "compelling state interest", but it must be demonstrated by rigid scrutiny that there are no reasonable ways to achieve the States' goals by means which impose a lesser limitation on the rights of the group disadvantaged by the racial classification. Bakke v. Regents of the University of California, Sup.,

32 Cal. Rptr. 680, 690. In this case, there has never been a showing that the affirmative hiring plan is the least intrusive or even the most effective means to ameliorate allegedly past discriminatory hiring practices.

In Bakke, the Court struck down a special admissions program which afforded a preference on the basis of race to persons who were not as qualified for the study of medicine as non-minority applicants denied admission. The facts in Bakke parallel the facts in this case. Since no showing has been made of past discrimination, what exists is a racial preference, for which no compelling governmental interest has been shown.

Ironically, the very system designed to cure allegedly past discrimination invidiously discriminates in reverse against non-minorities. "No form of discrimination should be opposed more vigorously than the quota system." Mc-Williams, A Mask for Privilege (1948 p. 238.); also see Associated General Contractors of

California v. Department of Commerce, ___F2d____ (1977), where a determination was made that minority quota systems are "invidious and unconstitutional".

Notwithstanding this Court's decision in Washington v. Davis, supra., and the complete lack of proof of past discrimination, the Honorable John T. Curtin effectively continued the application of the invidious two list hiring system by denying petitioners an opportunity to be heard.

Part III of the Court's decision in Washington v. Davis held that a written entrance examination was validated when a positive relationship between the test and training course performance was shown. In their Title VII cause of action, plaintiffs in Howard alleged that the written qualifying examination given and administered by the Rochester Police Department was insufficiently related to job performance.

Thus, in both Constitutional and Title VII respects, the factual allegations contained

in the Howard complaint are invalid measurements of racial discrimination according to present standards. The Consent Decree which grew out of the Howard action, therefore, rests on an insecure foundation.

In the interest of uniformity of judgments and a clear settlement of the law in this context, this Court should exercise its power of supervision.

CONCLUSION

For the reasons above stated, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Constitutional Provisions, Statutes and Regulations

U.S. CONSTITUTION

1. Article XIV, §1 of the United States Constitution:

> Citizenship defined; privileges of citizens - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. STATUTES

2. 28 U.S.C. §1343 (3) which provides for original jurisdiction, without regard to the amount in controversy, of any civil action authorized

by law "to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the United States."

3. 42 U.S.C. §1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subjected to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

4. 42 U.S.C. §1983:

> Every person who, under color of any

statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other property proceedings for redress.

5. 42 U.S.C. §2000d:

No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

6. 42 U.S.C. §2000e et. seq. in pertinent part:

(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, separate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

7. 42 U.S.C. §2000d-2:

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or

retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

8. 42 U.S.C. §2000e-5k:

In any action or proceeding under this subchapter, the Court, in its discretion, may allow the prevailing party, other than the commission or the United States, a reasonable attorney's fee as part of the costs, and the commission and the United States shall be liable for costs the same as a private person.

FEDERAL REGULATIONS

9. 28 C.F.R. §42.201 (a)-(b):

(a) The purpose of this subpart is to enforce the provisions of the 14th Amendment to the Constitution by eliminating discrimination on the

grounds of race, color, creed, sex, or national origin in the employment practices of State agencies or offices receiving financial assistance extended by this Department.

(b) The regulations in this subpart apply to the employment practices of planning agencies, law enforcement agencies, and other agencies or offices of States or unites of general local government administering, conducting, or participating in any program or activity receiving Federal financial assistance extended Under Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (the Act).

10. 28 C.F.R. §42.203:

No agency or office to which this subpart applies under §42.201 shall discriminate in its employment practices against employees or applicants for employment because of race, color, creed, sex or

national origin.

NEW YORK STATE CONSTITUTION

11. Article I, §11:

No person shall be denied the equal protection of the laws of this State or any subdivision thereof.

12. Article V, §6:

Appointments and promotions in the Civil Service of the State and of all the Civil Divisions thereof, including cities ***, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, so far as practicable, shall be competitive, ***.

CHARTER OF THE CITY OF ROCHESTER

13. §3-3 (A), (B), (G):

The charter of the City of Rochester provides that the Defendant City Manager has the following powers:

a. To see that all laws and ordinances are enforced.

b. To appoint and remove the heads of all departments the members of all Board and all subordinate officers and employees, except as otherwise provided in this local law.

c. To execute deed and to enter into contracts on behalf of the City, except as may be otherwise provided by law.

14. §8A-2:

The Charter of the City of Rochester provides for the authority of the Defendant, Chief of Police, as follows:

He shall appoint, with the approval of the City Manager, the personnel of all divisions under his jurisdiction.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN E. HOWARD, GREGORY W. SCOTT, JOHNNY L. SMITH, TOMAS VAZQUEZ, JOHN WYCHE, HENRY ROUSE, ARCHIE ROUSE, AFRO-AMERICAN POLICE ASSOCIATION, Individually and on behalf of all other persons similarly situated,	
Plaintiffs,	ORDER AND JUDGMENT
-vs-	74 Civ. 234
ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK, THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT, MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION, EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,	
Defendants.	

The parties hereto having entered into a Stipulation for Settlement of the issues raised in this action; and the Court having ordered that notice of hearing on the advisability of the settlement be given to the members of the class; and the Court, after said notice and hearing, having approved the terms of the said Stipulation for Settlement,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. All written examinations which the Monroe County Civil Service Commission, its agents, employees, and successors, hereinafter use to determine eligibility for entry level positions in the Rochester Police Department shall be validated in accordance with the Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.

2. Until such time as twenty-five percent (25%) of the Rochester Police Department's officers are minority persons, defendants, their agents, employees, and successors, shall make appointments to the entry level position of police officer in the following manner:

   a. After each examination process, the Monroe County Civil Service Committion, its agents, employees, and successors, shall establish an eligibility list of qualified candidates which includes two sublists:

      (1) The first sublist shall consist of all qualified minority canidates, ranked in order of their relative standing on said examination.

(2) The second sublist shall consist of all qualified nonminority candidates, ranked in order of their relative standing on said examination.

b. The City of Rochester shall make appointments by selecting two persons from the sublist of qualified minority candidates for every three persons selected from the sublist of qualified nonminority candidates.

c. In the event that all names of persons on the sublist of qualified minority candidates are exhausted, defendants, their agents, employees, and successors, shall make no further appointments until such time as an examination process is conducted and new eligibility lists and sublists are established, except that upon the exhaustion of the first sublist, the City of Rochester may make up to six appointments from the second sublist, provided that upon the establishment of a new first sublist the first four appointments to the Rochester Police Department thereafter shall be made from said new first sublist, and thereafter appointments shall be made in accordance with paragraph 2(b).

d. In the event the contingency specified in paragraph 2(c) occurs, all the persons remaining on the second sublist shall be given the option of submitting to the new examination process or of having their total score resulting from the prior examination process carried over and integrated into a new second sublist by being ranked in order of their relative standing with those persons having taken the new examination

process. In no event shall a person be carried over more than once, and in no event shall any sublists be effective for more than two years from the date of its original establishment.

3. Until such time as twenty-five percent (25%) of the Rochester Police Department's police officers are minority persons, defendants, their agents, employees, and successors, shall make appointments to any and all training programs including, but not limited to, the Police Cadet Program, in the manner described in paragraphs 2(a) - 2(c) herein; provided that the thirteen (13) individuals who were appointed to the Cadet Program on February 20, 1975, shall be appointed to the Rochester Police Department without regard to the requirements of paragraphs 2(a) - (c).

4. Defendants, their agents, employees, and successors shall make appointments based on the 1974 examination for police officer in the manner described in paragraphs 2(a) - 2(c) herein.

5. Within one hundred and twenty (120) days after entry of an order approving this

stipulation, the City of Rochester, its agents, employees, and successors, after consultation with plaintiffs' representatives, shall develop and implement a program for recruitment of minority persons for positions in the Rochester Police Department. The City shall pay the reasonable and necessary expenses of plaintiffs' consultant for travel, accommodation, and meals for one week.

6. Defendants, their agents, employees, and successors shall not reject a minority applicant for a position as police officer in the Rochester Police Department on the basis of a record of arrest or conviction, a background investigation, a psychological test and/or psychiatric interview unless said applicant is informed in writing of the specific reason(s) for the rejection and his right to review. A decision to reject said applicant on the basis of a background investigation, psychological test and/or psychiatric interview shall be subject to review if the applicant files a written request with the Monroe County Civil Service Commission within thirty (30) days after

mailing of the notice of rejection and his right to review. The review shall be conducted by a Review Panel comprised of a representative of the Civil Service Commission, a representative of the Rochester Police Department, and the Affirmative Action Officer of the City of Rochester or his representative.

7. Until such time as twenty-five percent (25%) of the Rochester Police Department's officers are minority persons, the Monroe County Civil Service Commission, its agents, employees, and successors shall file the following documents with the Clerk of the United States District Court for the Western District of New York on or before June 1 of each year:

(a) the written examinations which are used to determine eligibility for a position of police officer; and

(b) the validation studies of the written examinations described in paragraph 1; and

(c) an annual report describing:

(1) the number of nonminority and minority applicants for the position of police officer;

(2) the number of nonminority and minority persons appointed to the position of police officer;

(3) the number of nonminority and minority persons who are rejected at each step in the selection process for the position of police officer; and

(4) new selection procedures or devices.

8. The City of Rochester and the County of Monroe shall each pay plaintiffs, John E. Howard, Gregory W. Scott, Johnny L. Smith, Tomas Vazquez, John Wyche, and Henry Rouse, the sum of two hundred fifty dollars ($250.00) each upon receipt from each plaintiff of a release in full and complete satisfaction and settlement of any and all claims of said plaintiffs arising from defendants' past employment practices relating to employment of persons in the Rochester Police Department.

9. The City of Rochester and the County of Monroe shall each pay plaintiffs attorneys, the Monroe County Legal Assistance Corporation, the sum of three thousand dollars ($3,000.00) as reimbursement for the costs and attorneys' fees for this litigation.

10. (a) The term "minority" as used herein shall refer to a person who is black, Spanish-surnamed, or a member of some other nonwhite minority group. (b) The term "nonminority" as used herein shall refer to a person who is not a minority person as defined in paragraph 10(a).

11. The hiring mechanism set forth in paragraphs 2 and 3 is a temporary measure pursuant to federal law designed to remedy the racially disproportionate impact of prior employment practices. The hiring mechanism set forth in paragraphs 2 and 3 shall remain in effect only until such time as twenty-five percent (25%) of the Rochester Police Department's officers are minority persons.

12. The United States District Court for the Western District of New York shall continue to have jurisdiction of this matter to entertain an application by any party hereto, made upon papers served upon the other parties hereto at least 10 days prior to the return date thereof, seeking relief in the form of interpretation, application,

adjustment or termination of any of the terms of this Stipulation on the grounds of inequity or impracticability.

13. Immediately after the Court has made and entered its order approving the terms of this Stipulation, the parties hereto shall join in an appropriate application to the New York State Division of Human Rights to dismiss with prejudice all proceedings pending before it regarding the same subject matter brought by any or all of the named plaintiffs herein.

14. This action is hereby dismissed with prejudice to the named plaintiffs and the class of persons consisting of all black, Spanish-surnamed, and other nonwhite persons who, prior to the date of this Order have applied for employment as a police officer in the Rochester Police Department and have been rejected for any reason at any step of the examination process.

Dated: May 12, 1975

S/ Harold P. Burke
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RONALD PRATE, LEONARD LA ROSA, PATRICIA PLUMERI, PATRICIA A. DOYLE, THERESA YOUNG, TERRENCE P. ANDERSON, MICHAEL A. DI GIOVANNI, GARY GENNARINO, MICHAEL C. KELLER, CHARLES J. ZONA, JOSEPH P. TANTALO, MICHAEL PERRY and SAMUEL T. GERMANO,

Plaintiffs

-vs-

Civ-
76-418

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; and EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Defendants

-vs-

RONALD S. ZAVAGLIA, CAROL TSCHIDERER and THOMAS A. TSCHIDERER,

Plaintiffs

-vs-

Civ-
76-433

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; AND EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Defendants

and

JOHN HOWARD, JOHN WYCHE and JOHNNY SMITH,

Defendants-Intervenors.

APPEARANCES: ANTELL, HARRIS & CALLERI (ANGELO T. CALLERI, ESQ., of counsel), Rochester, New York, for Plaintiffs

LOUIS N. KASH, ESQ., Corporation Counsel of the City of Rochester (EMIL J. KARCICH, ESQ., of counsel), Rochester, New York, for defendants Freedman & Hastings.

JOSEPH PILATO, ESQ., Deputy County Attorney for defendants County of Monroe Civil Service Commission and Executive Director of the County of Monroe Civil Service Commission.

DAAN BRAVEMAN, ESQ., Greater Up-State Law Project, Rochester, New York,

and

MARIANNE ARTUSIO, ESQ., Monroe County Legal Assistance Corporation, Rochester, New York for Defendants-Intervenors.

Plaintiffs have brought these consolidated actions to seek compensatory and injunctive relief for what they claim to be discrimination in the recruiting, testing and hiring of applicants for the position of police officer in the City of Rochester, New York.

The Plaintiffs are white applicants for the position of police officer who challenge these practices as preferring black, Spanish-surnamed and other non-white persons for such positions. Defendants are public officials responsible for hiring applicants for positions as police officers in the Rochester Police Department. Defendant-Intervenors are the named plaintiffs in the lawsuit entitled John E. Howard, et al. v. Elisha Freedman, et al., Civil Docket No. 74-234 (W.D.N.Y.). The consent decree approved by Judge Harold P. Burke in the latter action approved practices which are the subject of the action.

A brief review of the history of the Howard litigation and earlier developments in this suit will place the present motion in perspective. In 1974 John Howard and other plaintiffs commenced an action under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. against the very defendants in this case. On the day trial was to begin, the parties agreed to terms for settlement. After a hearing Judge Burke entered an order incorporating the terms of the settlement agreement. The order provides for validation of written examinations, a minority recruitment program, a goal of 25% minority employment, and a temporary appointment mechanism to reach the hiring goal. Over a year later, a group of non-minority applicants, including 14 of the 16 plaintiffs in this suit, moved to intervene and reopen the Howard case on grounds of reverse discrimination against non-minority individuals. I found that motion to be untimely since the plaintiffs had notice of the terms of the consent decree but failed to act at that time. To reopen

that case would have caused undue delay and hardship to the original parties. Howard v. Freedman, Civ-74-234 (W.D.N.Y. June 22, 1976). Subsequently the applicants for intervention stipulated to a dismissal of their appeal to the Second Circuit on October 22, 1976.

Plaintiffs filed the complaint in this action with the court on September 17, 1976. A motion for a preliminary injunction against the appointment of successful police applicants to the Police Academy was denied on October 20, 1976. The action is currently before the court on defendants' motion to dismiss under Fed.R.Civ.P. 12(b) for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

FEDERAL LAW CLAIMS

Defendants challenge the court's jurisdiction in this action since it constitutes a collateral attack on the final court order in John E. Howard, et al. v. Elisha Freedman, et al, Civil Docket No. 74-234 (W.D.N.Y. 1975). They

cite Oburn v. Shapp, 393 F.Supp. 561 576 (E.D.Pa. 1975), aff'd on other grounds, 521 F.2d 142 (3d Cir. 1975), to establish that in a similar case, a white police applicant's challenge to affirmative hiring relief granted by court order to minority applicants was impermissible.[1/] Furthermore, in Construction Industry Combined Committee v. International Unions of Operating Engineers, 67 F.R.D. 664 (E.D. Mo. 1975), the court would not permit litigation of the merits of a Title VII consent decree in a separate action. There the court noted that the proper avenue for relief would have been a timely intervention in the original case.

I must follow the line of legal precedent cited in Oburn and Construction Industry. This suit constitutes an impermissible collateral attack on Judge Burke's ruling in Howard. The plaintiffs in this case should properly have sought timely intervention in the Howard case, but failed to do so as ruled in my June 22, 1976

decision. To permit further challenge of the Howard consent decree would clearly violate the policy under Title VII to promote settlement, Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968). This would also result in continued uncertainty for all parties involved and render the concept of final judgments meaningless. Cf. Class v. Norton, 505 F.2d 123, 125 (2d Cir. 1974).

Even if this court could assert jurisdiction over the subject matter, the complaint still fails to state a claim upon which relief may be granted.

Time and again in the employment discrimination context, the courts have held that the Constitution does not bar remedial orders granting a limited preference to members of groups that have previously been discriminated against. See Rios. v. Enterprise Association Steamfitters Local 638, 501 F.2d 622, 628-630 (2d Cir. 1974); see also E.E.O.C. v. AT&T Co., 419 F.Supp. 1022, 1044-45 (E.D.Pa. 1976). The cases cited by plaintiffs are distinguishable from this case since they

do not involve entry levels goals. See, e.g., Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). Therefore, no legal challenge may be mounted by this action against the limited use of preferences approved in the Howard decree.

Defendants also argue that dismissal is warranted because the plaintiffs have failed to comply with the jurisdictional prerequisite of filing a complaint with the Equal Employment Opportunity Commission and exhausting their administrative remedies. Since I believe that the suit may be dismissed as an improper collateral attack, I do not find it necessary to rule on this ground.

STATE LAW CLAIMS

In their complaints plaintiffs also assert that defendants' conduct violates the New York State Constitution. Defendants argue that this court should not take pendent jurisdiction over the state claim or, in the alternative, that

these allegations should be dismissed for failure to state a claim upon which relief may be granted.

Since the court cannot assert subject matter jurisdiction over the plaintiffs' federal law action, it must also forego jurisdiction of the pendent state law claims. See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1965).

Furthermore, the practices which the plaintiffs challenge were properly established by Judge Burke in the Howard consent decree. Since that remedy was imposed pursuant to Title VII, it suspends the application of conflicting state law. U.S. Const. art.VI, cl.2; see also Louisiana v. United States, 380 U.S. 145 (1965); Carter v. Gallagher, 452 F.2d 315, 328 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972). Therefore, the plaintiffs' complaint must also be dismissed as to claims grounded in state law since they fail to state a claim upon which relief may be granted.

The Clerk is directed to enter Judgment dismissing plaintiffs' complaint.

ATTORNEY FEES

Defendants-Intervenors have moved to recover reasonable attorney fees and costs incurred in this suit. Under 42 U.S.C. §2000e-5(K), the court has discretion to award a reasonable attorney fee to the prevailing party in a Title VII action. The Second Circuit has ruled that a prevailing defendant should be permitted such fees only where the action brought is found to be "unreasonable, meritless or vexatious." Carrion v. Yeshiva University, 535 F.2d 722 (2d Cir. 1976).

In this action the plaintiffs have brought claims which are virtually identical to those asserted in their prior unsuccessful motion to intervene in the Howard litigation. Furthermore, this attack on the Howard order has been brought despite the body of case law in this and other circuits which rejects such claims. Based upon these considerations, this suit may be considered unreasonable and vexatious. Defendants-Intervenors are therefore directed to submit an affidavit to the court detailing their attorney fees in this

action. Plaintiffs may also file an affidavit in opposition to the motion for attorney fees. These affidavits shall be filed not later than May 23, 1977. A hearing on defendants' application shall be held on June 17, 1977 at 9:00 a.m.

So ordered.

S/ John T. Curtin
JOHN T. CURTIN
United States District Judge

DATED: May 3, 1977

1/

Since the ruling Judge Green has, in a separate decision, dismissed the complaint in Oburn. He found the claim of reverse discrimination to be an improper collateral attack over which he could not assert subject matter jurisdiction. See Oburn v. Shapp, 70 F.R.D. 549 (E.D.Pa. 1976) aff'd 546 F.2d 418 (3rd Cir. 1976), cert. denied, 45 U.S.L.W. 3688 (April 19, 1977).

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of October one thousand nine hundred and seventy-seven.

Present:

HON. STERRY R. WATERMAN

HON. WILLIAM H. MULLIGAN

HON. WILLIAM H. TIMBERS

Circuit Judges, 77-7253

Ronald Prate, Leonard LaRosa, Patricia Plumeri, Patricia A. Doyle, Theresa Young, Terrence P. Anderson, Michael A. DiGiovanni, Gary Gennarino, Michael C. Keller, Charles J. Zona, Joseph P. Tantalo, Michael Perry and Samuel T. Germano,

Plaintiffs-Appellants,

v.

Elisha Freedman, City Manager of the City of Rochester, New York, Thomas Hastings, Chief of Police of the City of Rochester Police Department, Members of the County of Monroe Civil Service Commission, and Executive Director of the County of Monroe Civil Service Commission,

Defendants-Intervenors-Appellees.

Ronald S. Zavaglia, Carol Tschiderer, and Thomas A. Tschiderer,

Plaintiffs-Appellants,

v.

Elisha Freedman, City Manager of the City of Rochester, New York, Thomas Hastings, Chief of Police of the City of Rochester Police Department, Members of the County of Monroe Civil Service Commission, and Executive Director of the County of Monroe Civil Service Commission,

Defendant-Appellees,

John Howard, Johnny L. Smith, and John Wyche,

Defendants-Intervenors-Appellees.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk

By ARTHUR HELLER, Deputy Clerk

Supreme Court, U. S.
FILED
APR 19 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
UNITED STATES OF AMERICA
No. 77-1015

OCTOBER TERM 1977

RONALD PRATE, LEONARD LA ROSA, PATRICIA PLUMERI, PATRICIA A. DOYLE, THERESA YOUNG, TERRENCE P. ANDERSON, MICHAEL A. DI GIOVANNI, GARY GENNARINO, MICHAEL C. KELLER, CHARLES J. ZONA, JOSEPH P. TANTALO, MICHAEL PERRY, SAMUEL T. GERMANO, RONALD S. ZAVGLIA, CAROL TSCHIDERER and THOMAS A. TSCHIDERER,

Petitioners,

-vs-

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; and EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Respondents.

-vs-

JOHN HOWARD, JOHN WYCHE and JOHNNY SMITH,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ANGELO T. CALLERI, ESQ.
ANTELL, HARRIS & CALLERI
ATTORNEYS AND COUNSELORS AT LAW
600 MARINE MIDLAND BUILDING
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ROCHESTER, NEW YORK 14614

Petitioners submit herewith by-way of Supplemental Brief in support of arguments previously advanced the recently reported cases of Detroit Police Officers Association v. Young, 16 E.P.D. ¶8147 (E.D. MICH 1978) and U.S. v. City of Alexandria, 16 FEP Cases 930 (E.D. LA. 1977).

In Detroit Police Officers Association v. Young, supra., the Court struck down a voluntary affirmative action program since there was no finding of past discrimination in promotional practices within the Detroit Police Department. The system caused the selection of approximately one black male for every white male chosen for promotion. Its effect was to pass over better-qualified white police officers in preference for black officers solely on the basis of race. As the Court stated at page 4727 of its Decision, "[t]here was, in actuality, two lists, one for white males and one for black males."

The Defendant, Police Officers Association, argued that past discrimination was illustrated by the disparity between the percentage of blacks on the employer's work force (17.23 percent) and the racial composition of the general population of Detroit (44 percent black). The Court, citing Hazelwood School District v. United States, (14 E.P.D. ¶7633), ____U.S._____, 45 U.S.L.W. 4882 (June 27, 1977), admonished that the true measure of discrimination is derived from a comparision between the composition of the employer's work force and the racial composition of those meeting the special qualifications in the relevant labor market.

The relevant labor market, viz., the area from which the bulk of all applicants are drawn, was determined not to be the City of Detroit but the Tri-County area encompassing the said City. Significantly, when the proper standard was applied, it was determined that 18.6% of the persons meeting the special qualifications in the relevant labor market were black compared

with a racial composition on the Detroit Police Department of 17.23%. Thus, pursuant to 28 C.F.R. §42.306(c) which provides:

> "a significant disparity between minority representation in the service population and the minority representation in the agency work force may be deemed to exist if the percentage of a minority group in the employment of the agency is not at least 70% of the percentage of the minority in the service population"

no discrimination was found to exist.

This Court's attention is directed to the preliminary statement of the Complaint in the action entitled John E. Howard, et al v. Elisha Freedman, et al, W.D.N.Y. CA. 74-234 wherein, for the purpose of showing past discriminatory hiring practices, Plaintiffs erroneously compared the percentage of black and Spanish surnamed police officers in the Rochester Police Department (4%) to the percentage of these minority groups in the general population of the City of Rochester (20%).

Thus, the same statistical error in the

Detroit Police Officers Association case exists in the instant case and the same result should, therefore, follow.

Not only has there never been a hearing on the merits on the issue of the existence of past discrimination but the wrong statistical comparison is advanced in the Howard Complaint in support of the contention of discrimination. Petitioners respectfully submit that without an appropriate statistical measurement of discrimination, the Consent Order, signed by the Honorable Harold P. Burke, United States District Court Judge, dated May 12, 1975, is unlawful since its necessity has not been demonstrated. As was stated by the Court at page 4742-3 of its Decision:

> "in the absence of proof of prior discrimination as claimed by the Defendants the preferential promotional plan of the Defendants clearly violates Title VII as an impermissible racial quota. 42 U.S.C. 2000E-2(a),(j). This conclusion would persist even if the instant plan had been judicially mandated since as a pre-condition to quota

type relief under the Act prior unlawful discrimination must be found to exist."

Section 706(g) of Title VII, 42 U.S.C. 2000E-5(g), provides in pertinent part as follows:

> "*If the Court finds* that the Respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the Complaint, the Court may enjoin the Respondent from engaging in such unlawful employment practice, and Order such affirmative action as may be appropriate ... or any other equitable relief as the Court deems appropriate ..." (emphasis provided)

The Federal District Court, in interpreting the above Statute, in connection with its legislative history, required a finding of unlawful discrimination stating:

> "Prior racial discrimination against blacks being absent in this case, the Court holds as a matter of law that §706(g) would not allow *any* quota regardless of whether it was voluntary or Court ordered. To do so would be to install a remedy where there has been no wrong." (emphasis provided)

In evaluating the voluntary affirmative

action plan, the Court used the standard enunciated in Washington v. Davis, 427 U.S. 229, 48 L. AD 2d 597, 96 S. CT. 2040 (1976), notwithstanding that the voluntary plan went into effect prior to this Court's Decision in Washington v. Davis, supra. The Court found, as a fact, that there was no invidious discrimination against blacks within the Detroit Police Department so as to justify the imposition of the racial promotional quota. Further application of the Washington standard by the Court led to the conclusion that the system itself intentionally and invidiously discriminated against white police officers who sought promotion as as to invalidate it absent a compelling governmental interest.

In the instant case, Respondents have never proved invidious discrimination within the Rochester Police Department so as to justify the discriminatory two list hiring system nor did they show a compelling governmental interest for the continuation of the invidious system which, on its face, discriminates

against white applicants to the Rochester Police Department. In short, Respondents have never been put to their heavy burden of proof while Petitioners have been denied their rightful judicial remedy.

Furthermore, compelling governmental interest does not lie in the imposition of racial quotas. As was perceptively written by the Federal District Court at page 4747 of its Decision:

> "The evil of the departmental quota system lies in its effect, not in its 'affirmative action' name. While the purpose of a quota system is generally compassionate its effect is intolerable because it denigrates individuals by reducing them to a single immutable birth characteristic - skin pigmentation. The concept of a quota disregards the fact that persons are not fungible goods and that special qualifications may be required for the job in question. It prefers some while excluding others on the basis of an attribute totally unconnected with the merits of the promotional candidate."

In the recently reported case of U.S. v.

City of Alexandria, 16 F.E.P. cases 930 (A.D. LA. 1977), the Court, when presented for signature with a "Partial Consent Decree" allegedly designed to cure the affects of past discriminatory hiring practices within police and fire departments in the State of Louisiana, refused to sign the Decree stating at page 931:

> "The parties have cited to this Court no case in which an issue was specifically raised concerning the rectitude of a Court's ordering a quota system merely on the consent of the parties before the Courts, without an independent determination by the Court that the tests for imposition of quotas have been met."

The tests referred to are those established by Kirkland v. New York State Department of Correctional Services, previously cited by Petitioners at page 23 of their Petition For Writ of Certiorari, viz, there must be a "clear-cut pattern of long-continued and egregious discrimination" before a racial quota is permitted. Absent such a showing, the terms of the Consent Decree are unlawful, unreasonable and inequitable.

As the Federal District Court stated:

> "If Congress intends that life-tenured members of the Federal Judiciary sign Consent Decrees which order discrimination against a large segment of our population, without any finding of past discrimination against minorities, merely in the name of expediency, it should so amend the Civil Rights Act of 1964." U.S. v. City of Alexandria, 16 F.E.P. cases supra. at page 932.

Petitioners herein have thus far been denied their right to challenge just such a Decree signed without any showing of previous discriminatory hiring practice. It is respectfully submitted that Petitioners are entitled to go forward with the instant litigation requiring the Respondents to sustain their heavy burden of proof of prior discrimination and compelling governmental interest for the imposition of the invidiously discriminatory two list hiring system at issue herein.

CONCLUSION

For the foregoing supplemental reasons, Petitioners respectfully pray that this Court will

grant the requested Writ of Certiorari to review the instant case.

Respectfully submitted,

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Supreme Court, U. S.
FILED
FEB 13 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

NO. 77-1015

RONALD PRATE, LEONARD LA ROSA, PATRICIA PLUMERI, PATRICIA A. DOYLE, THERESA YOUNG, TERRENCE P. ANDERSON, MICHAEL A. DI GIOVANNI, GARY GENNARINO, MICHAEL C. KELLER, CHARLES J. ZONA, JOSEPH P. TANTALO, MICHAEL PERRY, SAMUEL T. GERMANO, RONALD S. ZAVAGLIA, CAROL TSCHIDERER and THOMAS A. TSCHIDERER,

Petitioners,

vs.

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; and EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Respondents,

vs.

JOHN HOWARD, JOHN WYCHE and JOHNNY SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

RONALD PRATE, et al.,

Petitioners,

-vs-

ELISHA FREEDMAN, et al.,

Respondents,

-vs-

JOHN HOWARD, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents John Howard, John Wyche and Johnny Smith submit this brief in opposition to petitioners' request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 20, 1977.

OPINIONS BELOW

The judgment of the United States

Court of Appeals for the Second Circuit, entered on October 20, 1977, affirmed the dismissal of the complaint by the United States District Court for the Western District of New York. The judgment of the United States Court of Appeals for the Second Circuit is attached to the Petition as Appendix D. The decision of the United States District Court for the Western District of New York is attached to the Petition as Appendix C and is reported at 430 F.Supp. 1373 (W.D.N.Y. 1977).

QUESTIONS PRESENTED

1. Whether a final judgment in a prior lawsuit may be collaterally attacked by petitioners who failed to file a timely intervention motion in the prior case.
2. Whether petitioners who failed to comply with the jurisdictional prerequisites to commencement of a Title VII action may nevertheless assert claims under that statute.
3. Whether the Second Circuit's judgment on the merits of petitioners' claims is consistent with the decisions of other Courts of Appeals.
4. Whether the Second Circuit's judgment is consistent with this Court's decision in Washington v. Davis.

STATEMENT OF THE CASE

On September 17, 1976, petitioners instituted these consolidated actions seeking to invalidate the terms of a final Order and Judgment entered on May 12, 1975, in a lawsuit entitled "John E. Howard, et al. v. Elisha Freedman, et al.," 74 Civ. 234 (W.D.N.Y.). Respondents are the public officials responsible for hiring applicants for positions as police officers in the Rochester Police Department. Additionally, three of the named plaintiffs in the Howard lawsuit -- John Howard, Johnny Smith and John Wyche -- intervened in the district court and are respondents in this proceeding.

A brief review of the Howard litigation is necessary to fully understand the issues presented in the Petition.

In 1974, John Howard and other individual and organizational plaintiffs commenced an action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., ("Title VII") against the very defendants named in the present lawsuit. The complaint in Howard challenged a broad range of employment practices and policies relating to the initial hiring and promotion of police officers in the Rochester Police Department. Plaintiffs there contested utilization of (1) certain recruitment techniques; (2) entrance level and promotional examinations; (3) psychological examinations; (4) certain educational requirements; (5) background investigations; (6) height requirements; and (7) arrest and conviction record requirements. It was alleged that

these practices were used for a number of years despite the fact that they excluded a disproportionately higher number of minority candidates and were completely unrelated to job performance. Indeed, plaintiffs in Howard contended that such practices resulted in a police department which, at that time, employed only 26 (4%) black and Spanish-surnamed officers.

Following motions for class certification and preliminary relief and after completion of extensive discovery, the case was scheduled for trial. However, on the day trial was to commence, the parties agreed upon the terms for settlement of the lawsuit. Subsequently, the district court conducted a hearing pursuant to Rule 23(e) of the

Federal Rules of Civil Procedure to determine the fairness and propriety of the stipulation and, on May 12, 1975, entered an order incorporating the terms of the settlement agreement. The order provides, among other things, that (1) written examinations used by the Department shall be validated as required by federal guidelines; (2) the Department shall develop and implement a program for recruitment of minority persons; (3) the Department shall establish a goal of twenty-five percent (25%) minority employment; and (4) until the goal is reached, appointments shall be made pursuant to a specified hiring mechanism. It is expressly provided that the hiring mechanism is "a temporary measure pursuant to federal law designed to remedy the racially disproportionate impact

of prior employment practices." (Petition at B-8). Upon entry of the Order, the parties to the original Howard case began implementation of its provisions and, throughout the past two and one-half years, have worked together to ensure compliance with the mandate.

Thirteen months after the final order and Judgment were entered in Howard, nonminority individuals, including 14 of the 16 petitioners in the present action, applied for intervention in the Howard case and sought to reopen and invalidate the Order on the grounds that it discriminated against them. The district court denied the intervention application and, in so doing, stated:

> "The applicants for intervention [Petitioners] had ample notice of the pendency of this [Howard] lawsuit. Numerous articles appeared in the Rochester papers and notices were published in the local newspapers that a hearing would be held on the advisability of the proposed settlement of the action. The May 12, 1975 judgment and order was also widely publicized. If the applicants were truly disturbed by this judgment, they might have sought intervention at that time.
>
> Furthermore, to permit the applicants to reopen this lawsuit would result in unfair delays and consequences to the parties who have worked long and hard for the settlement and ultimate conclusion of this lawsuit." Howard v. Freedman, 74 Civ. 234 (W.D.N.Y. June 22, 1976).

Petitioners filed a notice of appeal from the order denying intervention but subsequently stipulated to dismissal of the appeal.

These same individuals then filed the instant actions seeking to accomplish the identical result -- invalidation of the final Howard order. Petitioners

moved for preliminary relief asserting, as they did on their unsuccessful intervention application, that the relief mandated by the Howard decree violates the Constitution and various Civil Rights Acts. On October 20, 1976, the district court denied plaintiffs' motion for a preliminary injunction. Subsequently, by decision and order, dated May 3, 1977, the Hon. John T. Curtin dismissed petitioners' complaint. 430 F.Supp. 1373 (W.D.N.Y. 1977). The court held that petitioners' challenge to the Howard Order constitutes an impermissible collateral attack on a prior final judgment. Moreover, the court held that even assuming petitioners could collaterally challenge the order at this late date, their complaints fail to state a claim upon which relief may be granted. The court determined that the final order in Howard was entered in full conformity with both federal law and the district court's equitable power to remedy the effects of the city officials' past discrimination against members of minority groups. Petitioners appealed from the order dismissing their complaints and, on October 20, 1977, the United States Court of Appeals for the Second Circuit affirmed without opinion.

Petitioners then filed the instant Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REASONS FOR DENYING THE PETITION

I

PETITIONERS MAY NOT COLLATERALLY ATTACK THE FINAL JUDGMENT IN THE HOWARD CASE

Petitioners instituted these consolidated actions seeking to enjoin defendants-respondents from a course of conduct which was mandated by the final order and judgment in the Howard case. Their complaint specifically requests injunctive relief which would not only prohibit further compliance with that order[1] but also invalidate prior action taken pursuant to the decree.[2] The instant litigation is an attack on the Howard order and seeks relief which would impair the rights of the parties to that prior lawsuit.

1 Prate Complaint at ¶27; Zavaglia Complaint at ¶21

2 Prate Complaint at ¶27-28; Zavaglia Complaint at ¶21.

The courts' determination that such a collateral challenge is impermissible is fully consistent with decisions by other federal courts. See Black and White Children of Pontiac School System v. School System of Pontiac, 464 F.2d 103 (6th Cir. 1972); Oburn v. Shapp, 70 F.R.D. 549 (E.D. Pa. 1976), aff'd 546 F.2d 418 (3d Cir. 1976), cert. denied, 97 S.Ct. 1650 (1977); United States v. City of Chicago, 395 F.Supp. 329, 336-37 (N.D. Ill.), aff'd 525 F.2d 695 (7th Cir. 1975); Construction Industry Combined Committee v. International Union of Operating Engineers, 67 F.R.D. 664 (E.D. Mo. 1975).

Plainly, petitioners misconstrued the proper remedy to protect whatever interests they may have had in the Howard litigation. They could have -- and should have -- filed a timely motion

to intervene in that proceeding. Rather petitioners waited until thirteen months after the Howard order was entered before applying for intervention.[3] The district court denied the intervention application as untimely[4] and, in so doing, found that petitioners had ample notice of the pendency of the Howard lawsuit and should have sought intervention at that time.[5]

3 Two of the petitioners did not even seek leave to intervene.

4 Howard v. Freedman, 74 Civ. 234 (W.D.N.Y. June 22, 1976).

5 The record in the Howard case further reveals that approximately one month after the Howard order was entered, the Civil Service Commission sent a letter to all candidates for the position of police officer, including the proposed intervenors in Howard. The letter carefully explained the terms of the Howard Order and invited candidates to inspect the Order in the office of the Civil Service Commission. Additionally, the letter requested each candidate to complete a form and return it to the Commission. (Affidavit of Daan Braveman, Esq., sworn to June 19, 1976). Despite this actual knowledge, the proposed intervenors (footnote cont'd on page 15).

Having failed to properly and promptly protect their rights, petitioners attempted to correct their error by filing the instant lawsuits. To permit petitioners to further challenge the Howard Order in a separate proceeding would subject the parties to the Howard case to the risk of inconsistent or contradictory judgments. Moreover, as the courts below correctly held, to allow such a collateral challenge would render meaningless the concept of final judgments and constitute a substantial interference with the orderly administration of justice. See

(footnote 5 cont'd)
waited nearly one year before applying for intervention in the Howard case. (This Court may take judicial notice of the record in the Howard case. National Fire Insurance Co. v. Thompson, 281 U.S. 331, 336 (1929)).

also, Rios v. Enterprise Association Steamfitters Local, 520 F.2d 352, 355-56 n.3 (2d Cir. 1975); Class v. Norton, 505 F.2d 123, 125 (2d Cir. 1974). In these circumstances, the district court correctly held that it lacked jurisdiction to entertain petitioners' collateral challenge to a final judgment entered in a prior case in which petitioners could have asserted their rights if they had acted in a timely fashion.

II

PETITIONERS FAILED TO COMPLY WITH THE JURISDICTIONAL PREREQUISITES TO A TITLE VII ACTION AND THUS MAY NOT ASSERT CLAIMS UNDER THAT STATUTE

Even assuming for the sake of argument that the district court could entertain petitioners' collateral challenge, it lacked jurisdiction to hear those claims which allegedly arise under Title VII.[6] The jurisdictional prerequisites to commencement of a Title VII action have been clearly stated by this Court. First, the party claiming to be aggrieved must file a timely charge with the Equal Employment Opportunity Commission. Second, the party must receive a notice of the right to sue and commence the court action within ninety days.

---

6 42 U.S.C. §§2000e et seq.

Alexander v. Gardner-Denver Company, 411 U.S. 792, 798 (1973); 42 U.S.C. §2000e-5.

Once again, petitioners failed to utilize the proper procedures to protect their interests. Indeed, none of the sixteen petitioners complied with the statutorily mandated procedural requirements. In such circumstances, the district court lacked jurisdiction over petitioners' Title VII claims.[7]

7 While the district court did not decide on this basis (Petition, Appendix C-8), this Court may consider the absence of subject matter jurisdiction over the Title VII claims.

III

THE JUDGMENT ON THE MERITS OF PETITIONERS' CLAIMS DOES NOT CONFLICT WITH RULINGS BY OTHER COURTS OF APPEALS

Assuming petitioners could overcome the various procedural barriers to adjudication of their case, their challenge to the Howard order must nevertheless fail. The limited remedial relief mandated by the Howard order was a proper and, indeed, essential method for remedying the continuing effects of past discrimination against black and other nonwhite applicants for police positions. The courts below ruled that such relief violates neither the Constitution nor Title VII and the other Civil Rights Acts.[8] That determination does not conflict -- but rather is completely in

8 42 U.S.C. §1981; 42 U.S.C. §1983.

accord -- with the decisions by other Court of Appeals. See, e.g., E.E.O.C. v. American Telephone and Telegraph, 556 F.2d 167 (3d Cir. 1977), Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. Masonry Contractors' Ass'n., 497 F.2d 871 (6th Cir. 1974); Morrow v. Chrisler, 491 F.2d 1063 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974); United States v. N. L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Local 86, 443 F.2d 544 (9th Cir.) cert. denied, 404 U.S. 984 (1971).[9]

9 Nor does the determination conflict with other decisions by the Second Circuit which has consistently upheld the temporary use of hiring mechanisms as a method for alleviating the effects of discrimination. See, e.g., Patterson v. (fn. cont'd)

Relying on Bakke v. Regents of University of California, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), cert. gr. 97 S.Ct. 1098 (1977), petitioners attempt to distinguish these cases by suggesting that the remedial relief directed in Howard was not based on a finding of past discrimination. (Petition at 17, 31). That suggestion is rather remarkable in view of the following language in the Howard order:

(fn. 9 cont'd)
Newspaper and Mail Deliverers' Union, 514 F.2d 767 (2d Cir. 1975); cert. denied sub nom. Larkin v. Patterson, 427 U.S. 911 (1976); Rios v. Enterprise Association Steamfitters Local, 501 F.2d 622 (2d Cir. 1974).

Moreover, if there is such a conflict -- as petitioners incorrectly assert -- the matter should be resolved by an en banc hearing rather than by Supreme Court review. F.R.A.P. 35. See Wisniewski v. United States, 351 U.S. 901, 902 (1957) (it is primarily the task of a Court of Appeals to reconcile its internal difficulties).

> "The hiring mechanism set forth in paragraphs 2 and 3 is a temporary measure pursuant to federal law to remedy the racially disproportionate impact of prior employment practices." (Petition at B-8) (emphasis added).

Thus Bakke has no application to the instant case. There, the California Supreme Court held that a minority sensitive program was invalid because it was not directed at prior discrimination by defendants. However, the court expressly observed that such relief is permissible if, as here, it is designed to remove the continuing injury resulting from defendants' previous racially discriminatory practices. Id. at 696, 553 P.2d at 1168.

Petitioners' assertion apparently is premised on the notion that remedial relief can be ordered only after a trial on the merits. (Petition at 22). However, such a notion fails to recognize

that the Howard case was a Title VII action and there is "great emphasis in Title VII to promote settlement." Oatis v. Crown Zellerbach Corporation, 398 F.2d 496, 498 (5th Cir. 1968). See Alexander v. Gardner-Denver Company, 415 U.S. 36, 44 (1974) (cooperation and voluntary compliance were selected as the preferred means for assuring equality of employment opportunitites).

Equally indefensible is petitioners' suggestion that the Howard relief is improper because they were "barred from participation at all levels in that case." (Petition at 26). Petitioners were barred from participating in the Howard litigation only as a result of their own inaction. Despite notice of the pendency of the Howard case and the

final order, petitioners did not attempt to assert their interest until long after final judgment. Accordingly, the courts below properly -- and in full conformity with decisions by other Court of Appeals -- found petitioners claims to be meritless.

IV

THE JUDGMENT OF THE SECOND CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN WASHINGTON v. DAVIS

Relying primarily on Washington v. Davis, 427 U.S. 229 (1976), petitioners argued below, and continue to assert in this Court, that subsequent "changes" in the law undermine the continued validity of the Howard order. (Petition at 28). A careful reading of Washington reveals that petitioners' contention is unsupportable and was properly rejected by the district court and court of appeals. This Court's decision in Washington discusses only the constitutional standard for adjudication of employment discrimination and does not apply to cases, such as Howard, which were brought under Title VII. Id. at 239. The standard which governed the Howard case was, and

remains, the one adopted by this court in Griggs v. Duke Power Company, 401 U.S. 424 (1971).[10]

Moreover, in Washington this court was not presented with, and did not discuss, any issue regarding the propriety of temporary remedial relief. If Washington has any application to the instant case, it would support the district court's decision to dismiss the complaints. To state a constitutional claim under Washington, petitioners must establish that the challenged hiring practices are the product of "an invidious discriminatory purpose." Id. at 242. That conclusion is foreclosed here since it is

10 Contrary to petitioner's argument (Petition at 30), this Court's decision in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) did not change the Griggs standard for evaluating Title VII claims.

undisputed that respondents are hiring pursuant to a federal court mandate, rather than any invidious purpose of discriminating against petitioners. See United Jewish Organizations v. Carey, 97 S.Ct. 997, 1017 (1977) (Stewart, J., concurring).

But, there exists an equally important reason for rejecting petitioners' claims even assuming that Washington changed existing Title VII law or somehow supports their position. The decision in Washington was rendered after entry of the Howard order. To allow these petitioners, as well as others, to reopen and relitigate a prior judgment because of a subsequent change in the law would prevent litigation from ever reaching a conclusion. As the Second Circuit said in Class v.

Norton, supra at 125, "[t]he efficient and fair administration of justice requires that litigation of a issue at some point come to an end."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that exercise of the Court's discretionary power of review is inappropriate in these circumstances. The merits of petitioners' underlying claims are not presented in a clear manner but rather are clouded by jurisdictional and procedural issues. Moreover, the judgment of the Second Circuit is in full conformity with decisions by this Court and by other Courts of Appeals. Accordingly, the Petition for Writ of Certiorari should be denied.

Dated: Rochester, New York
February 10, 1978

Respectfully Submitted,

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Supreme Court, U. S.
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In The

Supreme Court of the United States

NO. 77-1015

RONALD PRATE, LEONARD LA ROSA, PATRICIA PLUMERI, PATRICIA A. DOYLE, THERESA YOUNG, TERRENCE P. ANDERSON, MICHAEL A. DI GIOVANNI, GARY GENNARINO, MICHAEL C. KELLER, CHARLES J. ZONA, JOSEPH P. TANTALO, MICHAEL PERRY, SAMUEL T. GERMANO, RONALD S. ZAVAGLIA, CAROL TSCHIDERER and THOMAS A. TSCHIDERER,

Petitioners,

vs.

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; and EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Respondents,

vs.

JOHN HOWARD, JOHN WYCHE and JOHNNY SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Elisha Freedman and Thomas Hastings submit this brief in opposition to petitioners' request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 20, 1977.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit, entered on October 20, 1977, affirmed the dismissal of the complaint by the United States District Court for the Western District of New York. The judgment of the United States Court of Appeals for the Second Circuit is attached to the Petition as Appendix D. The decision of the United States District Court for the Western District of New York is attached to the Petition as Appendix C and is reported at 430 F.Supp. 1373 (W.D.N.Y. 1977).

QUESTIONS PRESENTED

1. Whether a temporary, remedial hiring quota required by a Consent Decree is lawful and proper or an unlawful act of discrimination against petitioners.
2. Whether the Second Circuit's judgment on the merits of petitioners' claims is consistent with the decisions of other Courts of Appeal.
3. Whether the Second Circuit's judgment is consistent with this Court's decision in Washington v. Davis.

STATEMENT OF THE CASE

On September 17, 1976, petitioners instituted these consolidated actions seeking to invalidate a final Order and Judgment of Honorable Harold P. Burke, dated May 12, 1975, in a lawsuit entitled "John E. Howard, et al v. Elisha Freedman, et al., 74 Civ. 234 (W.D.N.Y.).

Prior to the commencement of the present lawsuit, on June 18, 1976, a number of individuals, including 14 of the16 petitioners in the present action, sought to intervene and reopen the Howard case on the ground that that Order discriminated against nonminority applicants for the Rochester Police Department. After hearing oral argument, the District Court denied the application for intervention. Howard v. Freedman, 74 Civ. 234 (W.D.N.Y. June 22, 1976). The applicants for intervention filed a notice of appeal from the order denying intervention, but subse-

quently stipulated to dismissal of the appeal.

The petitioners then filed the instant actions seeking to accomplish the identical result, i.e., the invalidation of the final Order and Judgment in Howard. Petitioners moved for preliminary relief asserting, as they did in their unsuccessful intervention application, that the relief mandated by the Howard decree violates the Constitution and various Civil Rights Acts. On October 20, 1976, the District Court denied petitioners' motion for a preliminary injunction. Subsequently, by decision and order, dated May 3, 1977, the Honorable John T. Curtin dismissed petitioners' complaint. 430 F.Supp. 1373. In so doing, the Court held that petitioners' challenge to the Howard order constitutes an impermissable collateral attack on a prior final judgment. Moreover, the Court held that even assuming petitioners could collaterally attack

the Order in Howard, their complaints fail to state a claim upon which relief may be granted in that the final order in Howard was entered in full conformity with both federal law and the District Court's power to remedy the effects of past discrimination against members of minority groups.

Petitioners appealed from the Order dismissing their complaints and, on October 20, 1977, the United States Court of Appeals for the Second Circuit affirmed without opinion.

Petitioners then filed the instant petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REASONS FOR DENYING THE PETITION

I

THE TEMPORARY, REMEDIAL HIRING MECHANISMS REQUIRED BY THE HOWARD ORDER AND JUDGMENT ARE LAWFUL AND PROPER, AND SUCH PROCEDURES CANNOT BE DEEMED TO UNLAWFULLY DISCRIMINATE AGAINST PETITIONERS

The petitioners instituted these actions seeking compensatory and injunctive relief against the government respondents for alleged unlawful discrimination in the recruiting, testing and hiring for the position of Police Officer in the City of Rochester, New York. The actions of the government respondents of which the petitioners complain were taken pursuant to and in compliance with a final order and judgment in a lawsuit entitled "John E. Howard, et al. v. Elisha Freedman, et al.", 74 Civ. 234 (W.D.N.Y. May 12, 1975).

The original Howard litigation was brought by the present intervenors-respondents — John Howard, John Wyche and Johnny Smith — against the same government officials who are now respondents in

the present matter. Petitioners correctly point out, at page 1 of their reply to intervenors-respondents' brief in opposition to petition for writ of certiorari, that the original Howard lawsuit was brought pursuant to several causes of action, including TitleVII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§2000e, et seq.). However, the implications of petitioners' argument, that it is, therefore, improper to refer to Howard as a Title VII case does not bear close scrutiny. On June 27, 1977, this Court decided Dothard v. Rawlinson, _____U.S._____, 97 S.Ct. ____, 53 L.Ed.2d 786, a Title VII case despite the fact that the underlying complaint posed several causes of action. Certainly the original Howard plaintiffs were not required to meet the standards of proof under each cause of action in order to prevail; it was sufficient that they prevail under any of the causes of action. Significantly, at all times since the

commencement of the present actions, the Howard suit has been considered an action under Title VII. Prate v. Freedman, 430 F.Supp. 1373 (W.D.N.Y. 1977).

The original Howard lawsuit did not go to trial. On the day the trial was scheduled to begin, the parties agreed upon terms of settlement. Following a hearing held pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the District Court entered an order and judgment incorporating the terms of the stipulated settlement. Petitioners contend that a fact finding hearing should have been conducted by the District Court. This is not the rule in Title VII cases where public policy strongly favors voluntary compliance and settlement. Patterson v. Newspaper Deliverers' Union, 514 F.2d 767 (2d Cir. 1975); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975); Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977).

Although Howard did not proceed to trial, it did involve extensive discovery. Based on the extensive pre-trial discovery, the parties stipulated to settle the Title VII claims. In doing so the parties acted in good faith and, significantly, petitioners do not now allege the contrary. Nor do petitioners allege that the trial judge in Howard abused his discretion in approving the consent decree. The Howard case was dissimilar from the situation confronting the trial judge in the recent case of United States v. City of Alexandria, ____F.Supp. ____, 16 FEP Cases 930 (E.D.La. July 22, 1977). Although the latter case was not concerned with the precise issue of the adequacy of discovery, the trial judge refused to approve a partial consent decree on the ground that "no past discriminatory conduct has been proved, stipulated, or agreed to" and, in fact, "such past discrimination is specifically

and vigorously denied by the defendants." Id., 16 FEP Cases at 931. To the contrary, the consent decree in Howard specifically found and made reference to, as was stipulated by the parties, a "racially disproportionate impact of prior employment practices." (Petition at B-8). The power and authority of the trial judge in Howard to enter a consent decree, under the facts before the judge, cannot be disputed. Cotton v. Hinton, supra.

In Title VII cases it is axiomatic that the remedy must be sufficiently broad in scope to eliminate not only the unlawful discriminatory practices themselves, but also any disparate impact resulting from such practices. The powers of a district court to fashion an appropriate remedy is well established. As this Court has stated: "Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far

as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future'". Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). See also, Franks v. Bowman Transportation Co., 424 U.S. 747, 770 (1976).

Among the kinds of relief which may be granted by a district court is the imposition of a temporary employment quota, not to attain racial balance in the work force but to connect past discriminatory practices. While this court has not yet approved the use of a quota remedy to overcome employment discrimination, to date eight of the circuit courts of appeal have. Weber v. Kaiser Aluminum & Chemical Corp., 563 F2d. 216 (5th Cir. 1977); Davis v. County of Los Angeles, _____F.2d _____, 16 FEP Case 396 (9th Cir. Dec. 14, 1977). See, also, Point II, infra.

Plainly, preferential treatment on the basis

of race or national origin of the type set forth in the Howard order is not per se unlawful. On the contrary, such relief is not only lawful, it is required by Title VII to correct the continuing impact of past discriminatory employment practices. That granting affirmative relief to an injured class in a Title VII case may have an inherent adverse impact on others has been recognized by this Court. However, in Franks v. Bowman Transportation Co., supra, the Court, when confronted with the argument that retroactive seniority should not be granted to a class of discriminatees because to do so would conflict with the economic interests of other employees, rejected the argument primarily on the ground that to so limit the relief available to victims of discrimination for that reason would "frustrate the central 'make-whole' objective of Title VII". Id., at 773-74.

As in Franks, the remedy incorporated into the Howard Consent Decree was lawful and appropri-

ate under Title VII. Likewise, for the reasons set forth in Franks, individuals other than those within the class of plaintiffs are not themselves the victims of "reverse discrimination" or of any legally cognizable discrimination whatsoever. A remedy, lawful in itself, cannot at the same time be lawful.

Nor does the fact that the class to which Howard gave relief is identified in racial and national origin terms give rise to a constitutional cause of action under Washington v. Davis, 426 U.S. 229 (1976). To state a constitutional claim under Washington, it must be established that the challenged hiring practices are the product of "an invidious discriminatory purpose". Id. at 242. Since the hiring procedures of the Rochester Police Department are in compliance with a federal court order, the government respondents can hardly be said to be acting for a discriminatory purpose, much less an invidious discriminatory purpose, toward the petitioners.

II

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE AVAILABILITY OF A TEMPORARY REMEDIAL HIRING QUOTA IN CASES OF PAST EMPLOYMENT DISCRIMINATION

Petitioners continue to assert in this Court that there is a conflict among the circuits regarding the type of temporary remedial hiring quota relief granted by the District Court in the Howard consent decree. Petitioners' contentions on this point were properly rejected by the District Court and the Court of Appeals. The limited remedial relief granted by the Howard consent decree was a proper method for remedying the continuing effects of past discrimination against black and other non-white applicants for police positions. Such relief violates neither the Constitution nor statutory provisions. The Howard consent decree is in complete accord with the other decisions in the Second

Circuit. In United States v. Wood, Wire and Metal Lathers International Union, Local 46, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973), the Second Circuit approved a similar quota for the issuance of construction work permits. Such a quota was ordered by an administrator who was implementing a consent decree entered by the District Court. As in the Howard case, the consent decree was entered pursuant to a settlement agreement subsequent to discovery but prior to trial. While quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not. The District Court has the power and the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. Louisiana v. United States, 380 U.S. 145, 154 (1965). It is clear from the Howard

order that the quota established therein was designed as a temporary mechanism to correct past discriminatory practices:

> The hiring mechanism set forth in paragraphs 2 and 3 is a temporary measure pursuant to federal law to remedy the racially disproportionate impact of prior employment practices. (Petition at B-8).

The Second Circuit and all other circuits which have ruled on the legality of a temporary hiring quota for use in remedying past discrimination have been unanimous in upholding the power of a district court to impose such a remedy. Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied 421 U.S. 910 (1975); Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Vulcan Society v. Civil Service Commission, 490 F.2d 387 (2d Cir. 1973); E.E.O.C. v. American Telephone and Telegraph Company, 556 F.2d 167 (3rd Cir. 1977); Weber v. Kaiser Aluminum and Chemical Corporation, 563 F.2d 216 (5th Cir. 1977); United States v. Local

212, IBEW, 472 F.2d 634 (6th Cir. 1973); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Carter v. Gallagher, 452 F.2d 315 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972); Davis v. County of Los Angeles, _____F.2d _____, 16 FEP Cases 396 (9th Cir. Dec. 14, 1977).

Accordingly, the District Court and the Court of Appeals acted properly and in full conformity with decisions by the other circuits in approving the temporary remedial hiring quota in the Howard consent decree.

III

THE DECISION IN WASHINGTON V. DAVIS HAS NO IMPACT UPON THE VALIDITY OF THE HIRING PROCEDURES REQUIRED BY THE HOWARD CONSENT DECREE

Petitioners have argued below and continue to assert in the Court that the decision of this Court in Washington v. Davis, 426 U.S. 229 (1976), has undermined the continued validity of the consent decree entered in Howard order. However, even if this Court had changed the law governing Howard, petitioners do not have the right to re-open and relitigate the Howard case at this time. Petitioners had the opportunity to make a timely intervention in the Howard case and could have litigated any points at that time. The District Court and the Court of Appeals rightly decided that the Howard case should not be reopened.

The complaint in the Howard case was based upon several grounds, including the Constitution,

42 U.S.C. 1981, and Title VII of the Civil Rights Act of 1964, as amended. This Court's decision in Washington discusses only the constitutional standard for adjudication of employment discrimination cases and does not apply to cases which were brought under Title VII. This Court stated explicitly in Washington that the constitutional standards differ from Title VII:

> As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today. Id, 426 U.S. at 238-239.

This Court's statement in Washington that the constitutional standards differ from Title VII does not undermine the Howard consent decree. The Title VII basis of the Howard decree remains intact after the Washington decision. The standard

which governed the Howard case was, and remains, the standard adopted by this court in Griggs v. Duke Power Company, 401 U.S. 424 (1971). This court has followed the standards set forth in the Griggs case in deciding Title VII employment discrimination cases subsequent to Washington. In the case of Dothard v. Rawlinson, ____ U.S. _____, 53 L.Ed.2d 786 (1977), this Court stated that the standards set forth in Griggs and in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) were controlling in an employment discrimination case which did not involve an assertion of purposeful discriminatory motive. This court also reiterated in International Brotherhood of of Teamsters v. United States, 431 U.S. 324 (1977), that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and intent but that nonetheless discriminate in effect against a particular group. In reemphasizing this point, this Court

cited Griggs, Albemarle and Washington with approval, thereby indicating that the standards set forth in Griggs survived the decision in Washington. 431 U.S. 324 at _____, 52 L.Ed.2d 396 at 423.

The lower courts interpreting Washington have also been consistent in deciding that the Griggs standards are still applicable to Title VII cases. In Davis v. County of Los Angeles, _____ F.2d _____, 16 FEP Cases 396 (9th Cir. Dec. 14, 1977), the court decided that the Griggs Title VII standards remain intact after this Court's decision in Washington. Similar decisions have been reached by other circuits. Kinsey v. First Regional Securities, Inc, _____F.2d____, 14 FEP Cases 1143 (D.C. Cir. April 18, 1977); United States v. City of Chicago, ____F.2d_____, 16 FEP Cases 908 (7th Cir. February 21, 1978).

Petitioners therefore have no basis for their contention that the Washington decision has undermined the Howard consent decree.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that exercise of the Court's discretionary power of review is inappropriate in these circumstances. Moreover, the judgment of the Second Circuit is in full conformity with decisions by this Court and by other Courts of Appeals. Accordingly, the Petition for Writ of Certiorari should be denied.

Dated: Rochester, New York
April 11, 1978

Respectfully Submitted,

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Supreme Court, U. S.
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IN THE SUPREME COURT
UNITED STATES OF AMERICA
No. 77-1015

OCTOBER TERM 1977

RONALD PRATE, LEONARD LA ROSA, PATRICIA PLUMERI, PATRICIA A. DOYLE, THERESA YOUNG, TERRENCE P. ANDERSON, MICHAEL A. DIGIOVANNI, GARY GENNARINO, MICHAEL C. KELLER, CHARLES J. ZONA, JOSEPH P. TANTALO, MICHAEL PERRY, SAMUEL T. GERMANO, RONALD S. ZAVAGLIA, CAROL TSCHIDERER and THOMAS A. TSCHIDERER,

Petitioners,

-vs-

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; and EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Respondents,

-vs-

JOHN HOWARD, JOHN WYCHE and JOHNNY SMITH,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

NO. 77-1015

RONALD PRATE, et al.,

Petitioners,

-vs-

ELISHA FREEDMAN, et al.,

Respondents,

-vs-

JOHN HOWARD, et al.,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Petitioners submit this reply to Respondent's brief in opposition to the request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 20, 1977.

Respondent's brief in opposition to the Petition for the Writ of Certiorari severely understates and fails to disclose the history of the instant action. The law suit entitled "Johnny Howard, et al., v. Elisha Freedman, et al." 74 Civ. 234 (W.D.N.Y.) is referred to as an action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000(e) et seq." (brief in opposition at p. 25) when, in fact, it embodied six different causes of action under the 14th Amendment to the United States Constitution, the Civil Rights Acts of 1870 and 1871, Title VI and VII of the Civil Rights Act of 1964 and regulations promulgated by the United States Department of Justice. Citation of Oatis v. Crown Zellerbach Corp., 398 F 2d 496, 498 (Fifth Cir. 1968) and Alexander v. Gardner-Denver Company, 415 U.S. 36, 44 (1974) as authority for the promotion of settlement of Title VII actions addresses only the Title VII cause and

is of no consequence to those remaining.

In their treatment of the applicability of Washington v. Davis, 427 U.S. 229 (1976) to the Howard action, Respondents state at page 25 of their brief:

> "This Court's decision in Washington discusses only the Constitutional standard for adjudication of employment discrimination and does not apply to cases, such as Howard, which were brought under Title VII."

This is a plain distortion of the facts. The standard of invidious discrimination set forth in Washington is entirely applicable to the Howard constitutional claims. Apparently, the strength of Respondent's argument lies in their emphasis of the Title VII aspect of the Howard action but to refer to Howard as a Title VII action is evidence of the weakness of Respondents' position.

Moreover, Respondents have devoted an entire section of their brief to the jurisdictional prerequisites for the commencement of a Title VII action. Without citation of authority, Respondents request this Court to consider an alleged lack of subject matter jurisdiction below. The District Court did not dismiss upon this ground and review is, accordingly, inessential. It should be remembered that the consolidated Prate-Zavaglia action consisted of six separate causes of action, only one of which sought Title VII relief. Again, there is a misleading focus on Title VII which confuses the real issues being presented to this Court.

In their cursory dismissal of the significance of Bakke v. Regents of University of California, 132 Cal. Rptr. 680, 553, P.2d 1152 (1976), cert granted. 97 S.Ct. 1098 (1971), Respondents recite the following language from the Howard consent order:

> "The hiring mechanism set forth in paragraphs 2 and 3 is a temporary measure pursuant to Federal law to remedy the racially

disproportionate impact of
prior employment practices."
(Petition at B-8)

To recite, however, that an order is temporary in effect does not make it so. To make the conclusory pronouncement of the existence of past discrimination without any showing thereof, a hearing on the merits, findings of fact and an opportunity to be heard and to then fashion a remedy far broader than the alleged evil, which is itself unknown in proportion, is contrary to all authority within the Second Circuit and between Circuits. This is the issue which needs resolution by this Court and is unanswered by Respondents in the brief in opposition because there exists no precedent for such sweeping remedial relief.

Respondents brief in opposition is replete with a reiteration of rhetoric. In the name of the orderly administration of justice, final judgments and an end to litigation, Petitioners have been denied their right to procedural due

process. Petitioners have asked to be heard on a new and separate issue and have been estopped by a non-final, non-litigated judgment upon which they were not heard. It is not Petitioners who have failed to comply with proper procedure.

Petitioners do not dispute that "the efficient and fair administration of justice requires that litigation of an issue at some point come to an end." Class v. Norton, 505 F2d 123, 125 (Sec. Cir. 1974). The point, however, at which litigation ends must not occur before fairness and propriety have been adjudicated. If the decision of the United States Court of Appeals for the Second Circuit is permitted to stand, fundamental constitutional rights will have been forfeited in the name of order and efficiency within the administration of justice. It is respectfully submitted that the theory of finality of litigation was not intended to be so misapplied.

For the foregoing additional reasons, it is respectfully requested that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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